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In the Supreme Court of the United States

OCTOBER TERM, 1984

LARRY R. PARKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Following a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted of three counts of willful failure to file income tax returns, in violation of 26 U.S.C. 7203. He was sentenced to three concurrent terms of one year in prison, fined $15,000, and assessed the cost of the prosecution (Pet. App. A3-A5). The court of appeals affirmed (Pet. App. A1).

1. The evidence at trial, the sufficiency of which is not in dispute, showed that petitioner failed to file federal income tax returns for 1978, 1979, and 1980. A criminal investigation was commenced by the Internal Revenue Service in 1981, and petitioner was interviewed by the special agent assigned to the case. After being advised of his right to remain silent and his right to counsel, petitioner stated that he had not filed his individual federal income tax returns for 1978, 1979, or 1980. He further stated that he was aware of

his responsibility to file, that he had no legitimate reason for failing to file, and that he simply had procrastinated and put off filing the returns. Tr. 126-130. During the relevant time period, petitioner was president of the Eglin National Bank of Fort Walton Beach, Florida (Tr. 180-181).[1]

Petitioner conceded at trial that he had a duty to file returns for his 1978, 1979, and 1980 tax years and that he had failed to file returns for those years (Pet. 4). The only issue in dispute was whether his failures to file were willful. Petitioner argued that he had not acted willfully, but had negligently failed to file his returns as a result of personal and business difficulties (Pet. 5; Tr. 190).

With regard to the element of willfulness, the trial court, over petitioner's objection, read the following instruction to the jury (Pet. App. A11-A12):

> The third element which the government must prove beyond a reasonable doubt is the [*sic*] defendant's failure to make and file the returns in questions [*sic*] was willful. I instruct you that the term "willful," for purposes of these instructions, means voluntarily, means voluntary, [*sic*] deliberately and intentionally, as distinguished from accidentally, inadvertently or negligently.

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[1]In early 1977, the Internal Revenue Service, with petitioner's knowledge, conducted a criminal investigation into petitioner's failure to file returns for his 1972 through 1975 tax years (Tr. 108). A decision was made not to prosecute, and the case was referred for civil settlement (Tr. 109-111). During the course of the civil portion of the investigation it was determined that petitioner also had failed to file individual federal income tax returns for the 1976 and 1977 tax years (Tr. 116). The revenue agent assigned to the case discussed with petitioner his responsibility to file income tax returns and petitioner told the agent that "he had his tax area straight * * * and would be prepared to file in 1978" (Tr. 119).

> Negligence, even gross negligence, does not amount to willfulness. Willfulness involves an intentional violation of a known legal duty.
>
> There is no necessity for the government to prove that a defendant had an intention to defraud the government or to evade payment of any taxes in order for a defendant's failure to file to be willful under the provisions of the law.
>
> A demonstration of a good purpose is not a defense, nor is it a defense that a person intended to file in the future, or that he was too busy with personal or business affairs. If it is shown that the defendant intentionally violated a known legal duty to file a tax return, his reason for doing so is irrelevant.

The jury convicted petitioner on all three counts (Pet. 8). The court of appeals affirmed by order (Pet. App. A1).

2. Petitioner claims (Pet. 12-19) that a portion of the trial court's instruction regarding willfulness was improper. The trial court's charge, however, correctly reflected the governing principles laid down by this Court and the courts of appeals.

The single sentence of the instruction challenged by petitioner falls in the middle of the court's discussion of willfulness. The court first stated that the government had the burden of proving willfulness, and emphasized that willfulness was not negligence or gross negligence, but "involves an intentional violation of a known legal duty" (Pet. App. A11). The court then elaborated upon the definition of willfulness, noting that the government was not required to show that the defendant acted with an intent to defraud (Pet. App. A11-A12).

The court next stated (Pet. App. A12):

> A demonstration of a good purpose is not a defense, nor is it a defense that a person intended to file in the future, or that he was too busy with personal or business affairs.

Petitioner asserts that this sentence was erroneous as a matter of law and that it "neutralized" the defense that his failure to file the returns was the result of negligence. This argument is plainly without merit. Each portion of the challenged sentence correctly states the applicable law. The first statement — that "good purpose is not a defense" — is supported by *United States* v. *Pomponio*, 429 U.S. 10 (1976), in which this Court found that a defendant's motive is irrelevant under Section 7203, because the applicable standard is whether the defendant intentionally violated a legal duty. See also *United States* v. *Tucker*, 686 F.2d 230, 232 (5th Cir.), cert. denied, 459 U.S. 1071 (1982); *United States* v. *Pohlman*, 522 F.2d 974, 976-977 (8th Cir. 1975), cert. denied, 423 U.S. 1049 (1976). Second, the statement that "it is not a defense that a person intended to file in the future" is the holding of this Court's decision in *Sansone* v. *United States*, 380 U.S. 343, 354 (1965). Finally, it is settled that preoccupation with personal or business affairs does not negate an otherwise sufficient showing of willfulness. *United States* v. *Greenlee*, 517 F.2d 899, 903 (3d Cir.), cert. denied, 423 U.S. 985 (1975); *Bernabei* v. *United States*, 473 F.2d 1385 (6th Cir.), cert. denied, 414 U.S. 825 (1973).[2]

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[2]Petitioner attempts (Pet. 16, 18-19) to construe the challenged portion of the instruction as directing the jury to disregard any evidence regarding petitioner's preoccupation with other matters and his future intention to file the returns. It is clear that the court was not commenting on the relevance of this evidence, but was stating only that that such proof could not exonerate petitioner if the jury found that his failure to file was willful. Indeed, in instructing the jury as to how it should ascertain petitioner's intent, the court expressly directed the jury to consider "all of the facts and circumstances shown by the evidence" in determining whether petitioner acted willfully (Tr. 283).

Moreover, this small portion of the charge relating to willfulness could not have misled the jury regarding petitioner's negligence defense. It was qualified by the very next portion of the instruction, which stated (Pet. App. A12 (emphasis added)):

> If it is shown that the defendant *intentionally violated* a known legal duty to file a tax return, his reason for doing so is irrelevant.

This passage, and the court's earlier discussion contrasting willfulness and negligence, made clear to the jury that it could convict petitioner only if it found that his failure to file the returns was intentional rather than merely negligent.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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